

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

1. STATE OF OKLAHOMA, ex rel.)
W.A. DREW EDMONDSON, in his capacity as)
ATTORNEY GENERAL OF THE STATE OF)
OKLAHOMA and OKLAHOMA SECRETARY)
OF THE ENVIRONMENT C. MILES TOLBERT,)
in his capacity as the TRUSTEE FOR)
NATURAL RESOURCES FOR THE)
STATE OF OKLAHOMA,)

Plaintiffs,)

v.)

05-CV-0329 TCK-SAJ

1. TYSON FOODS, INC.,)
2. TYSON POULTRY, INC.,)
3. TYSON CHICKEN, INC.,)
4. COBB-VANTRESS, INC.,)
5. AVIAGEN, INC.,)
6. CAL-MAINE FOODS, INC.,)
7. CAL-MAINE FARMS, INC.,)
8. CARGILL, INC.,)
9. CARGILL TURKEY PRODUCTION, LLC,)
10. GEORGE'S, INC.,)
11. GEORGE'S FARMS, INC.,)
12. PETERSON FARMS, INC.,)
13. SIMMONS FOODS, INC., and)
14. WILLOW BROOK FOODS, INC.,)

Defendants.)

**CARGILL, INC. AND CARGILL TURKEY PRODUCTION, LLC'S RESPONSE TO PLAINTIFF'S
MOTION FOR PROTECTIVE ORDER**

Cargill, Inc. ("Cargill") and Cargill Turkey Production, LLC ("CTP") respond to the State of Oklahoma's Motion for Protective Order and Integrated Memorandum in Support (Dkt. # 911). At issue are Cargill's 18 Interrogatories and CTP's 17 Interrogatories. Plaintiff seeks to avoid responding to the Interrogatories in their entirety and moves the Court to enter a Protective

Order that the discovery not be had. Separately, Cargill and CTP have filed a joint motion to compel Plaintiff's responses or, in the alternative, to expand the number of permitted interrogatories in view of the factual and legal complexity of this case (Dkt. #902).

I. CARGILL'S INTERROGATORIES ARE PROPER

Cargill and CTP's Interrogatories generally seek discovery relating to Plaintiff's theory of the case. The Interrogatories are narrowly tailored to specific allegations made in the Plaintiff's Amended Complaint and in Plaintiff's arguments to this Court. Plaintiff objects to responding to any of the Interrogatories on the grounds that the Interrogatories contain an impermissible number of subparts. By Plaintiff's count, Cargill has served 90 separate Interrogatories and CTP has served as many as 138 separate Interrogatories. The effect of Plaintiff's request is to rewrite Fed.R.Civ.P., Rule 33 to such an extent that no meaningful discovery could ever be had through the use of Interrogatories.

The question for this Court is whether the alleged "subparts" are "logically or factually subsumed within and necessarily relate to the primary question." *See e.g., Clark v. Burlington N. R.R.*, 112 F.R.D. 117, 120 (N.D. Miss. 1986); *Kendall v. GES Explosion Servs.*, 174 F.R.D. 684 (D. Nev. 1997); *Nyfield v. Virgin Islands Tel. Corp.*, 200 F.R.D. 246, 247-48 (D.V.I. 2001). Clauses that define and narrow the request are not considered discrete subparts. *See e.g., Clark v. Burlington Northern Railroad*, 112 F.R.D. 117, 119 – 120 ("the subparts serve to narrow the scope by informing defendant of the precise descriptive details desired by plaintiff and relieves defendant of any obligation to supply other information.") For each of the Interrogatories, Cargill and CTP could have asked one primary question. Instead, however, additional language clarifying, defining, and limiting the scope of the Interrogatories is included.

Plaintiff's specific objections relate to Cargill and CTP's "contention interrogatories."¹

"Contention interrogatories are those interrogatories that seek information regarding a party's opinions or contentions that relate to facts or the application of law to facts. Fed.R.Civ.P. 33(c); 7 *Moore's Federal Practice* § 33.02[2][b] (3d ed. 1998). Examples of proper contention interrogatories include asking a party to (1) state its contentions or clarify whether it is making a contention, (2) articulate the facts underlying a contention, (3) assert a position or explain that position in relation to how the law applies to the facts, and (4) explain the legal or theoretical basis behind a contention. 7 *Moore's Federal Practice* § 33.02[2][b]." *Capacchione v. Charlotte-Mecklenburg Board of Education*, 182 F.R.D. 486, 489 (W.D.N.C. 1998).

Plaintiff specifically objects to Interrogatories that ask it to "articulate the facts underlying a contention" and to "assert a position or explain that position in relation to how the law applies to the facts."

A. The Interrogatories that ask Plaintiff to articulate the facts underlying a contention are proper.

Cargill Interrogatory Nos. 5, 6, 7, 8, 12, and 14, and CTP Interrogatory Nos. 3, 4, 5, 6, 7, 8, 9, 15, 16, 17, 18 ask Plaintiff to articulate the facts underlying their contentions. Plaintiff specifically objects to three such contention interrogatories:

1. CTP Interrogatories 3 and 4:

In ¶ 58 of the First Amended Complaint, Plaintiff alleges that:

Each of the Poultry Integrator Defendants has long known that poultry waste contains a number of constituents that can and do cause harm to the environment and pose human health hazards. These constituents include, but are not limited to:

- a. phosphorus/phosphorus compounds;
- b. nitrogen/nitrogen compounds;
- c. arsenic/arsenic compounds;
- d. zinc/zinc compounds;

¹ Cargill and CTP recognize that Plaintiff further suggests that its interrogatories seeking information relating to "each Cargill entity at issue" should be construed as separate Interrogatories. As demonstrated in Proposition I of Cargill and CTP's Motion to Compel and Section I.C herein, these are properly construed as one inquiry.

- e. hormones; and/or
- f. microbial pathogens.

CTP could have posed the primary question: *please detail the facts upon which you base the allegation in ¶ 58 of your Amended Complaint that the listed constituents in poultry litter cause harm to the environment and pose human health risks.* This must be construed as only one interrogatory. Instead, CTP posed Interrogatories 3 and 4 seeking only a portion of the information contained in the primary question. As a result of CTP's *limitation* of the scope of its inquiries, Plaintiff chooses to perceive the questions as 72 separate interrogatories.

In Interrogatory 3, CTP limited its request to the date when Plaintiff became aware of that poultry industry operations might be a potential source of the constituents in the IRW. If CTP had merely posed the primary question about the constituents generally, Plaintiff would have no basis for objection. Yet, Plaintiff suggests that CTP Interrogatory 3 standing alone should be construed as 28 separate interrogatories.

In Interrogatory 4, CTP limited its request to the date when Plaintiff became aware that the above-listed elements and compounds "may be the cause of perceived environmental harm" in the IRW. Again, the same analysis applies. Yet, Plaintiff suggests that CTP Interrogatory 4 standing alone should be construed as 44 separate interrogatories.

2. CTP Interrogatory No. 7

Plaintiff alleges that the land and waters of the IRW contain elevated levels of some or all of the above-listed constituents. *See* Plaintiff's Amended Complaint ¶ 59. Plaintiff alleges that "[t]he elevated levels of such constituents in the IRW, including in the lands, waters and sediment therein, as well as the resultant injury to the IRW, . . . have been caused by the Poultry Integrator Defendants' improper poultry waste disposal practices." *See* Plaintiff's Amended

Complaint ¶ 60. Plaintiff further alleges that elevated levels of phosphorus/phosphorus compounds and nitrogen and nitrogen/compounds “have in fact caused periodic algae blooms, excessive algal growths, hypolimnetic anoxia and other adverse impacts in the waters of the IRW, resulting in eutrophication.” *See* Plaintiff’s Amended Complaint ¶ 61. CTP Interrogatory No. 7 merely seeks the factual basis for the allegation that the waters in the IRW are eutrophic over a period of time. Had CTP so phrased its interrogatory instead of voluntarily narrowing the scope of its inquiry, Plaintiff could have no objection.

B. Cargill and CTP’s Interrogatories that ask Plaintiff to explain a specific allegation in relation to how the law applies to the facts are proper.

Cargill Interrogatories 1, 2, 3, 4, 9, 10, 11, 13, 15, 16, and 17 and CTP Interrogatories 11, 12, 13, and 14 ask Plaintiff to explain a specific allegation in relation to how the law applies to the facts. For instance, Cargill Interrogatory No. 1 states:

Separately for each Cargill entity at issue, state with particularity the factual and legal basis for the allegation contained in ¶ 43 of Your Amended Complaint that any Cargill entity “so dominates and controls the actions and activities of its respective poultry growers that the relationship is not one of independent contractor, but rather one of employer and employee or one of principal and agent, and one of owner, operator or arranger of poultry waste under CERCLA” and identify every witness upon whom You will rely to establish each fact.

The primary question asks Plaintiff to explain its allegation of an employer-employee relationship. Plaintiff is asked to provide *the basis* this claim, which presumably entails both fact and law. The fact that Cargill further defined the primary question does not warrant a blanket objection.

The balance of the Interrogatories at issue follows the same form. The application of law to facts is one inquiry. There is no reasonable method to break that inquiry into separate

interrogatories. Under Plaintiff's reading of Rule 33, an interrogatory concerning the application of law to facts would be forbidden.

C. It is proper for Cargill or CTP to inquire as to each Cargill entity at issue.

Plaintiff further objects to both sets of Interrogatories on the grounds that they ask Plaintiff to respond separately for each Cargill entity at issue. Plaintiff complains about the "waste disposal practices" of all defendants. Cargill and CTP understand these "waste disposal practices" to include the land application practices of contract growers in the IRW. CTP presently contracts with contract growers in the IRW. Previously, some of these growers contracted with Cargill. There is one set of operable facts at issue here. By seeking information relating to the "Cargill entity at issue," Cargill and CTP request that Plaintiff provide information on discrete topics over the course of the production history for these contract growers.

Consider whether Cargill Interrogatory No. 1, which asks Plaintiff to explain its allegation of an employer-employee relationship, constitutes two separate inquiries for Cargill and CTP. Cargill Interrogatory No. 1 seeks information about one discrete set of growers. If Cargill and CTP each asked the very same Interrogatory, the response would likely be identical. More importantly, if Plaintiff's response for each entity were different, Cargill and CTP undeniably are entitled to a clear understanding of what the alleged differences are.

Compare the Interrogatories to Plaintiff's own Interrogatories wherein it includes in the definition of each entity "its employees, agents, subsidiaries, divisions, and Contract Growers." Exhibit 1, Plaintiff's First Set of Interrogatories to the Defendant Cargill Turkey Production,

LLC.² If Plaintiff were to adhere to the counting methods it advocates, its own Interrogatories would violate Rule 33.

D. If Plaintiff's counting system is adopted its own Interrogatories would contain an impermissible number of subparts.

Compare Cargill and CTP's Interrogatories to Plaintiff's First Interrogatory to CTP which makes the following request:

For each of your poultry growing operations in the IRW since 1952, please provide the following information:

- a. name an physical location of the operation;
- b. dates of operation;
- c. type of operation (breeder, broiler, layer, ect);
- d. number of birds (aggregated annually at each location; and
- e. the name of the owner and operator.

Exhibit 1. Under Plaintiff's system, this Interrogatory would contain five separate distinct subparts which would be multiplied by 54 years which would be multiplied by the number of poultry growing operations. Plaintiff's single interrogatory so counted would violate Rule 33. Plaintiff cannot abide by its own counting methods.

II. PLAINTIFF IS ENGAGING IN DILATORY TACTICS

Plaintiff asserts that it has no option, but to object to all of the Interrogatories.³ Plaintiff fails to cite to any controlling case law in this district requiring such a drastic course of action. Instead, Plaintiff adopts an obscure view relying primarily on a 1993 case from the Western District of North Carolina. *See Herdlein Technologies, Inc. v. Century Contractors, Inc.*, 147

² CTP's made certain objections to Plaintiff's Interrogatory, but it did not refuse to respond alleging that said Interrogatory contains an impressible number of subparts. Applying Plaintiff's theory, CTP could have been refused to provide any response.

³ When Plaintiff made it clear during the meet and confer that they would not respond to any of the Interrogatories, Cargill and CTP moved forward with their Motion to Compel. Thereafter, Plaintiff filed its Motion for Protective Order simultaneously with filing their response brief.

F.R.D. 103 (W.D.N.C. 1993). More recently, the same district advised that “the responding party’s best course for adequately preserving its objections to supernumerary interrogatories is to answer up to the numerical limit and object to the remainder without answering.” *Capacchione v. Charlotte-Mecklenburg Board of Education*, 182 F.R.D. 486 (W.D.N.C. 1998), n. 4, citing 7 *Moore’s Federal Practice* § 33.30[1].⁴ Plaintiff did not provide any responses and instead requests this Court enter an order that said discovery not be had.

Plaintiff also relies upon a 2005 decision from the District of New Mexico. *Allaverdi v. Regents of the University of New Mexico*, 228 F.R.D. 696 (D.N.M. 2005). The *Allaverdi* court found that it was acceptable to object to all interrogatories, but ultimately granted a motion to compel finding the requesting party made a reasonable effort to comply with the rules governing the number of Interrogatories and required the responding party to answer all Interrogatories including those in excess of the allowable number. *Allaverdi*, 228 F.R.D. at 698. Plaintiff’s own authority holds that Plaintiff’s objections cannot be sustained.

Plaintiff attempts to limit their discussion to the number of Interrogatories, but signals that it will continue to object to the Interrogatories on other grounds once this discrete issue is resolved. In the Joint Status Report, Plaintiff request that no contention interrogatories be permitted. Dkt. #372, Joint Status Report, P. 5. In Plaintiff’s Motion for Protective Order, it advises the Court that it is reserving all other objections to Cargill’s Interrogatories, including

⁴ Whether *Herdlein Technologies, Inc.* can be cited as support for the proposition that a responding party should object to all Interrogatories has been called into question. “It appears, however, that the responding party may not have answered the interrogatories in numerical order up to the required number, but rather may have selected the interrogatories of its choosing to answer. This would clearly be improper.” 7 *Moore’s Federal Practice* 33.30[2] (3d Ed. 1998).

“burden.” Plaintiff’s Motion for Protective Order, (Dkt. 912), n. 1.⁵ Finally, Plaintiff asserts that it should not be required to respond to Cargill’s Interrogatories “because much of the information sought will not appropriately be available until the State provides the reports of its testifying experts . . .” Plaintiff’s Motion for Protective Order, P. 11.

Plaintiff promotes in its papers, in Court and in the media an array of broad allegations about environmental harm and human health risks. When asked for the facts that support the allegations, however, Plaintiff refuses to respond. Cargill and CTP are entitled to answers as to the specific basis for Plaintiff’s allegations without further delay.

WHEREFORE, premises considered, Cargill, Inc. and Cargill Turkey Production, LLC respectfully request that this Court deny Plaintiff’s Motion for Protective Order and order to Plaintiff’s to respond to their Interrogatories without further delay.

Respectfully submitted,

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⁵ Cargill recognizes that there may be objections based upon the attorney-client privilege and work product doctrine. However, the issues of relevance, timing and burden cannot be separated from the issues raised by Plaintiff.

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CERTIFICATE OF SERVICE

I certify that on the 6th day of October, 2006, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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